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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1969

No. 997

ASSOCIATED TRUCK LINES, INC., ET AL.,
*Appellants,*

v.

UNITED STATES OF AMERICA, ET AL.,
*Appellees.*

**On Appeal from the United States District Court for the Western District of Michigan, Southern Division**

## JURISDICTIONAL STATEMENT

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**On Appeal from the United States District Court for the Western District of Michigan, Southern Division**

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## JURISDICTIONAL STATEMENT

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Appellants, Associated Truck Lines, Inc., American Trucking Associations, Inc., and the Regular Common Carrier Conference of American Trucking Associations, Inc., appeal from the judgment of the United States District Court for the Western District of Michigan, Southern Division, entered on September 29, 1969, affirming a report and order of the Interstate Commerce Commission decided December 31, 1968, requiring the establishment by appellant Associated Truck Lines, Inc., of through-route, joint-rate, and interchange arrangements on shipments of furniture moving beyond Associated's lines, and directing the suspension of future similar tariff filings of other motor common carriers of

property cancelling such through-route, joint-rate, and interchange arrangements. Appellants submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that the questions are substantial.

## OPINION BELOW

The opinion and judgment of the District Court for the Western District of Michigan, Southern Division, entered September 29, 1969, but not yet officially reported at the time of the printing of this statement,[1] is reproduced in Appendix A hereto. A copy of the report and order of the Interstate Commerce Commission in Docket No. 34815, *National Furniture Traffic Conf.* v. *Associated Truck Lines, Inc.*, 332 I.C.C. 802, is attached hereto as Appendix B; a copy of the order of January 17, 1968, denying petitions for reconsideration therein is reproduced in Appendix C; a copy of the decision and order of October 10, 1967, therein is reproduced in Appendix D; and a copy of the Examiner's report and recommended order therein is attached as Appendix E.

## JURISDICTION

This suit was brought pursuant to 28 U.S.C. § 1336 to enjoin and set aside the report and order of the Interstate Commerce Commission. The decision and judgment of the District Court was entered on September 29, 1969, and notice of appeal was filed October 28, 1969. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Sections 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *American Trucking Associations, Inc.* v. *Atchison, T. &*

[1] The decision is unofficially reported at 1969 Fed. Carr. Rep. ¶ 82,141.

*S. F. Ry.*, 387 U.S. 399 (1967); *United States* v. *Drum*, 368 U.S. 370 (1962); *Frozen Food Express, Inc.* v. *United States*, 351 U.S. 40 (1956).

## STATUTES INVOLVED

The provisions of subsections (b), (c), and (d) of section 216 of the Interstate Commerce Act, 49 U.S.C. § 316, are reproduced in Appendix F hereto.

## QUESTIONS PRESENTED

1. Whether the Commission's requirement that Associated Truck Lines, Inc., in its tariff, shall establish with other carriers through-route, joint-rate, and interchange arrangements on shipments of furniture moving beyond its own lines, contravenes the provision of 49 U.S.C. § 316(c) which permits, but does not require, common carriers of property by motor vehicle to establish such through-route, joint-rate, and interchange arrangements.

2. Whether the Commission's determination to suspend arbitrarily from carrier tariffs the future cancellation by other property motor common carriers, through-route, joint-rate, and interchange arrangements with other carriers on shipments of particular commodities moving beyond their lines contravenes the provisions of 49 U.S.C. § 316(c) permitting, but not requiring, the establishment of such through-route, joint-rate, and interchange arrangements.

## STATEMENT OF THE CASE

Effective May 1, 1966, appellant Associated Truck Lines, Inc. (Associated), cancelled its through-route, joint-rate, and interchange arrangements on shipments of furniture between Central States territory[2] and the

[2] Central States territory generally embraces the States of Illinois, Indiana, Iowa, Michigan, Missouri, Ohio, Pennsylvania, West Virginia, and Wisconsin.

South.[3] Nine months later, on February 5, 1967, appellee National Furniture Traffic Conference (Conference) filed a complaint with the Interstate Commerce Commission (Commission) alleging that the tariff cancellation violated various provisions of the Interstate Commerce Act, and the matter was assigned for handling by modified procedure.

On July 27, 1967, the Commission served the report and recommended order of its Examiner (Appendix E) finding that the assailed tariff provision had not been shown unlawful and recommending that the complaint be dismissed. On exceptions and reply thereto, by decision and order dated October 10, 1967 (Appendix D), the Commission, Review Board No. 4, affirmed and adopted, with modification, the Examiner's report and recommended order, and, by order dated January 17, 1968 (Appendix C), the Commission, Division 2 acting as an Appellate Division, denied the Conference's petition for reconsideration. However, by order dated February 19, 1968, upon petition by the Conference, the proceeding was declared to be one involving an issue of general transportation importance, thus permitting reconsideration by the entire Commission.

On reconsideration, with one member concurring in part and one member dissenting, the Commission issued the assailed report and order (Appendix B) finding that Associated's tariff provision in question is an unreasonable practice contrary to section 216(b) of the Act, 49 U.S.C. § 316(b), and that it unduly and unreasonably disadvantages shipments of furniture contrary to section 216(d), 49 U.S.C. § 316(d), and is, therefore, unlawful. (App. B, pp. 22a-23a) Although Appellant Associated was the only defendant before it and although the complaint brought into issue only the assailed tariff provi-

[3] The South territory generally embraces the States of Alabama, Arkansas (in part), Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia.

sion of Associated, the Commission acted to condemn and cancel all similar tariff filings, both existing and to be proposed for the future, of all motor common carriers of property subject to its jurisdiction. It directed its Board of Suspension to suspend, "upon its own motion, even without shipper protest, future selective tariff filings similar to the one at hand," and announced that, as to those tariff provisions already established and not subject of an Investigation and or Suspension proceeding or formal complaint, it "would endeavor to obtain the necessary reforms" through the efforts of its Section of Tariffs and field staff. (App. B, p. 22a) By order dated March 6, 1969, appellants' petitions for reconsideration were denied.

Action was brought in the United States District Court for the Western District of Michigan, Southern Division, under Title 28, United States Code, sections 1336 and 2321, to review the ruling of the Commission. In a decision entered September 29, 1969 (App. A), the District Court affirmed the Commission's report and order. After summarizing the factual background of the assailed Associated tariff publication, the Commission's findings and those of the concurring Commissioner with respect thereto, the Court stated (App. A, p. 5a):

> "From an examination of the record we find substantial evidence, considering the record as a whole, to support this finding of the Commission.
>
> "The determination of the Commission is hereby affirmed."

The District Court did not consider and pass upon the question of the Commission's power to require Associated to establish through-route, joint-rate, and interchange arrangements in the light of the provisions of 49 U.S.C. § 316(c) making the establishment of such arrangements permissive rather than mandatory, nor upon the question of the lawfulness of the Commission's arbitrary condemnation of other similar tariff provisions not put

in issue before it, even though these questions were properly raised in the complaint and preserved in brief and oral argument.

## THE QUESTIONS ARE SUBSTANTIAL

The assailed report and order of the Commission abruptly reversed a long line of decisions [4] which have consistently held that Section 216(c) of the Interstate Commerce Act [5] is permissive and that, by its terms, motor common carriers of property are free to establish and maintain, and also free to withdraw or cancel, through-route, joint-rate, and interchange arrangements with other carriers. Although the complaint put into issue a single tariff provision of one individual motor carrier, the Commission used this proceeding to promulgate a new policy [6] radically limiting the right of motor common carriers of property under section 216(c) to voluntarily establish and maintain through-route, joint-rate, and interchange arrangements on shipments of property moving beyond their own lines.[7] In the assailed

[4] Cited in Appendix B, pp. 11a-12a.

[5] 49 U.S.C. § 316(c), reproduced in Appendix F hereto.

[6] The precedential nature of the proceeding was announced by its designation as one "involving an issue of general transportation importance" (App. B, pp. 7a-8a), thus permitting plenary consideration by the entire membership of the Commission under its General Rules of Practice (49 C.F.R. § 1100.101(a)(3)), and by the generalized statement of the question:

> "We reopened this proceeding to consider whether a motor common carrier of general commodities may lawfully refuse to participate in through routes, joint rates, and interchange agreements with respect to some authorized commodities and, at the same time, hold itself out to provide such service with respect to other authorized commodities." (App. B, p. 8a)

[7] The association appellants (American Trucking Associations, Inc., and Regular Common Carrier Conference of ATA) intervened in the proceeding before the Commission and joined in the judicial appeal because of the impact of this decision on all motor common carriers of property.

report and order, the Commission not only declared unlawful the individual tariff publication involved, but also condemned all similar tariff publications of all motor common carriers of property, both those presently in effect and those to be filed in the future.[8]

Section 216(c), unlike the statutory provisions governing other types of carriers,[9] provides that motor common carriers of property "*may* establish reasonable through routes and joint rates," but does not require them to do so. Despite this permissive provision of the governing statute, the Commission in the assailed report and order required Associated to establish through-route, joint-rate arrangements on shipments of furniture moving beyond its line and, in addition, directed that future similar tariff publications seeking to cancel such arrangements only on certain commodities be suspended, without shipper protest and without regard for the reason for the cancellation. The report declares, in the words of the dissenting Commissioner,[10] "in effect and as a matter of law, that if a motor common carrier maintains through routes on some traffic, it must maintain through routes on all traffic."

In affirming the assailed report and order, the District Court did not consider the basic question of the Commission's power under the statute to order a motor common carrier of property to establish and maintain through-route, joint-rate arrangements on all authorized

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[8] As to future tariff filings similar to the one at hand, the Commission directed its Board of Suspension to suspend them, "upon its own motion, even without shipper protest," and as to those publications already established and not subject to proceedings, it stated it would "initially endeavor to obtain the necessary reforms" through the efforts of its Section of Tariffs and field staff. (App. B, p. 22a)

[9] See 49 U.S.C. §§ 1(4) (common carriers subject to part I of the Act, 316(a) (common carriers of passengers by motor vehicle), and 905(b) (common carriers by water).

[10] Appendix B, p. 25a.

commodities if it provides such arrangements on any commodities. The Commission's determination for the first time herein that it has such power under the statute requires plenary consideration by this Court.

In enacting the Motor Carrier Act, 1935,[11] Congress specifically rejected the original proposal for mandatory through routes and joint rates between motor common carriers of property and adopted, in lieu thereof, the current permissive provision.[12] And on a number of occasions at least since 1961, Congress has failed to enact mandatory through-route, joint-rate provisions for motor carriers of property although urged by the Commission to do so.[13] Most recently on April 24, 1969,[14] the Commission submitted a legislative recommendation seeking amendment of part II of the Act to authorize it "to require the establishment of through routes and joint rates between motor common carriers of property and between those carriers and common carriers by rail, express, and water."[15]

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[11] Now part II of the Interstate Commerce Act, 49 U.S.C. §§ 301 *et seq.*

[12] Appendix B, p. 11a, citing 79 Cong. Rec. 5655.

[13] Such legislation was recommended by the Commission in each of its annual reports to Congress in 1961-1964 (75th Annual Report, p. 186; 76th Annual Report, p. 201; 77th Annual Report, p. 19; 78th Annual Report, p. 69), and a number of bills were introduced in Congress to implement these recommendations, but none were enacted. (S. 3510 and H.R. 12362 in the 87th Congress; S. 676 and H.R. 2088 in the 88th Congress; S. 1785 and H.R. 7166 in the 89th Congress; S. 751 and H.R. 6533 in the 90th Congress.) In addition, S. 1062 and H.R. 4701 (88th Congress), omnibus transportation bills, included proposals to encourage through routes and joint rates for all modes of transportation, but were not enacted.

[14] Interstate Commerce Commission press release # 112-69.

[15] Under Section 216(c), such through routes and joint rates between motor common carriers of property, on the one hand, and, on the other, common carriers by rail, express, and water, are also permissive. The assailed report and order also raises the question whether the Commission may require rail, express and water com-

These Commission efforts to secure legislative change are not prompted by any question as to the scope of its authority. The Commission has consistently recognized that under the permissive provisions of Section 216(c) it has no power to compel the establishment of through routes by motor common carriers of property and it cannot, therefore, prevent such carriers from closing such through routes, whether the route was closed only as to certain points,[16] only in conjunction with certain connecting carriers,[17] or only on movements on which the publishing carrier would be the intermediate rather than the originating or delivering carrier.[18] In testimony in support of legislative proposals for mandatory through routes and joint rates for motor common carriers of property, the Commission has denied that it has the very power it seeks here to assert. In the justification in support of S. 751 in the 90th Congress, then Chairman Tucker of the Commission stated: [19]

> "At present the Commission does not have the authority to require motor carriers to establish the through routes and joint rates. As a result, motor carriers may restrict the establishment of through routes and joint rates to selected commodities."

And in testimony on the proposed legislation in May 1967, just nineteen months before the assailed report and

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mon carriers which have entered into through-route, joint rate arrangements with motor carriers on specific commodities to refrain from cancelling them if they so desire, or, indeed, to enter into such arrangements with motor carriers on *all* commodities.

[16] *Southeast Shippers Assn., Inc.* v. *Akers Motor Lines, Inc.*, 54 M.C.C. 770 (1952) (cancellation of through route, joint rate, and interchange arrangements on shipments to or from Malone, N.Y.)

[17] *East South Joint Rates and Routes, Cancellation*, 44 M.C.C. 747 (1945) (cancellation because of inability to agree upon interchange arrangements.)

[18] *East South Joint Rates and Routes, Cancellation, supra.*

[19] 113 Cong. Rec. 1983.

order were issued,[20] Commissioner Murphy read from a letter complaining of carrier cancellation of through-route, joint-rate, and interchange arrangements on furniture, and stated: "However, the Commission has no effective manner of correcting the described situation." [21]

In the assailed report and order, the Commission disclaimed any attempt to compel through routes and joint rates: [22]

> "We desire to make it unmistakably clear that we are not attempting here to assert any jurisdiction to establish through routes, joint rates, and interchange arrangements between common carriers of property by motor which Congress has entrusted to the managerial discretion of these carriers."

Nevertheless, the order, if it becomes effective,[23] will require Associated to establish through-route, joint-rate arrangements on shipments of furniture. Additionally, the report and order seeks to apply the same compulsion to all

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[20] Hearings before the Subcommittee on Surface Transportation of the Senate Committee on Commerce, 90th Cong., 1st Sess., ser. 90-37, at 21-22 (1967).

[21] *And see* I.&S. Docket No. M-20023, *Furniture Restrictions By Associated Transport, Inc.* (not printed) (decided February 24, 1966), cited in the assailed report and order (Appendix B, p. 10a, n.2), in which the Commission, Rates and Practices Review Board, referring to *East South Joint Rates and Routes, supra*, said:

> "If a motor common carrier of property may cancel its participation in through routes and joint rates applying on all commodities, it logically follows that it may do so with respect to one commodity provided that some unlawfulness, under some other section of the act, does not result therefrom." (mimeo. p. 6).

[22] Appendix B, pp. 21a-22a.

[23] By stipulation and order agreed to by the parties and approved by the District Court below, appellee-defendants United States of America and Interstate Commerce Commission agreed to the entry of an interlocutory injunction to remain in effect until final determination by the three-judge Court in consideration of a rapid disposition of this matter on the merits. The Commission order herein has not yet become effective.

other motor common carriers of property by directing automatic suspension of other similar tariff provisions tendered for filing. Thus, a motor common carrier of property seeking, for whatever reason, to cancel through-route, joint-rate arrangements on particular traffic will be denied its statutory right to do so. In either case, the carrier will be denied the freedom, which the Commission has heretofore consistently recognized, to establish and maintain through-route, joint rate arrangements.

The Commission's decision rests upon the proposition that for a motor common carrier to hold out through-route, joint-rate arrangements on some authorized commodities and not on others is *per se* unlawful: "Associated may not merely refuse to participate in joint movements of furniture, and, at the same time participate in such movements on other traffic."[24] As the dissenting Commissioner states,[25] this decision establishes a stricter rule under this permissive statutory provision than that applied under provisions which authorize the Commission to require through routes between carriers of other modes. In numerous proceedings involving carriers by railroad under the mandatory provisions of part I of the Act, both the Commission and the courts have approved through-route, joint-rate arrangements only on specific commodities,[26] even over a challenge because the arrangements were not established for all commodities.[27]

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[24] Appendix B., p. 21a.

[25] Appendix B., pp. 25a-26a.

[26] *E.g., Denver & R.G.W.R. Co.* v. *Union P.R. Co.*, 351 U.S. 321 (1956); *Western Pacific R. Co.* v. *Camas Prairie R. Co.*, 316 I.C.C. 795 (1962), aff'd *sub nom. Western Pacific R. Co.* v. *United States*, 230 F. Supp. 852 (N.D.Cal. 1964); *Chicago, M., St. P.&P.R. Co.* v. *Spokane, P. & S. Ry. Co.*, 300 I.C.C. 453 (1957), aff'd *sub nom., Chicago, M St. P. & P.R. Co.* v. *United States*, 182 F. Supp. 81, 366 U.S. 745 (1961).

[27] See *Denver & R.G.W.R. Co.* v. *Union P.R. Co., supra*, 351 U.S. at 326.

Although disclaiming any assertion of jurisdiction to compel through-route, joint-rate arrangements between motor common carriers of property contrary to the statute, the Commission has established a new policy declaring, in effect, that if such a carrier maintains through routes on some traffic, it must maintain them on all traffic. The choice left to the carrier under this policy is clearly either to forego all through-route, joint-rate arrangements on traffic moving beyond its own lines or to establish and maintain such arrangements on all such beyond traffic. The decision substantially nullifies that freedom to establish such through-route, joint-rate arrangements "which Congress entrusted to the managerial discretion of these carriers." [28] The failure of the District Court to consider and decide the question of whether the Commission's action herein exceeds its statutory authority requires plenary consideration by this Court.

[28] Appendix B, pp. 21a-22a.

## CONCLUSION

The questions presented by this appeal are new, substantial and of public importance. For the reasons stated, appellants urge the Court to note probable jurisdiction and to reverse the judgment of the District Court with remand to that Court for disposition consistent with this Court's opinion.

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